No. 82-2143

IN THE

Supreme Court of the United States

TERM 1983

BURLINGTON NORTHERN RAILROAD COMPANY,
Successor In Interest by Merger to St. Louis-San Francisco Railway Company,
Petitioner,

v.

JAMES C. BAIR,
Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court of Missouri

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court may properly consider petitioner's contentions concerning its separate present value instruction-when the judgment below on that point rests upon an independent and adequate state ground and when, as here, Missouri practice is consistent with this Court's current views as to computation of damages.

2. Whether the Missouri Approved (MAI) FELA damages instruction may be properly given when the same was designed for the purpose of complying with the Federal Liabilty Employers Act (FELA), which is an avowed departure from the common law.

3. Whether the court below, having reviewed the evidence as to damages and having found the verdict herein to be reasonable and not to be excessive, properly affirmed that verdict by applying a harmless error analysis, a procedure sanctioned by this Court, to the trial court's failure to give a separate income tax instruction; and whether this Court should review the aforesaid issue since a *Liepelt* type instruction has now been made a part of the Missouri Approved (MAI) FELA damage instructions and the issue is therefore unlikely to recur in the Missouri Courts.

4. Whether the trial court could properly give a verdict directing instruction based on MAI 24.01, a form of instruction approved by the Missouri Supreme Court for FELA cases, when that instruction was fully consistent with and properly set out federal substantive law under FELA.

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JURISDICTIONAL STATEMENT

Respondent accepts petitioner's jurisdictional statement with the following exceptions: Respondent specifically denies that jurisdiction of the questions presented is properly invoked under 28 USC § 1257(3), on the ground that, as to certain of those questions as will be explained more fully below, the judgment of the Missouri Supreme Court, en banc, rests upon an independent and adequate state ground of decision. Respondent further specifically denies that the pattern jury instructions petitioner challenges are in any manner unconstitutional or that the judgment of the Missouri Supreme Court, en banc, is contrary to any applicable decision of this Court or the United States Courts of Appeal.

STATEMENT OF THIS CASE

Petitioner's statement of the case does not constitute a full and fair statement of the facts relevant to the issues herein. In order to avoid repetition additional relevant facts will be set forth under the appropriate point in the argument.

ARGUMENT

I.

This Writ Should Be Denied Because This Court Is Without Jurisdiction Of Petitioner's Contentions Regarding The Separate Present Value Instruction In That The Missouri Supreme Court Rejected Petitioner's Contentions On An Independent And Adequate State Ground. The Writ Should Further Be Denied Because The Missouri Supreme Court Decision In The Instant Case Is Entirely Consistent With And In Compliance With This Court's Current Views Pertaining To The Computation Of Damages Under Federal Law.

This Court is without jurisdiction of petitioner's (hereinafter "petitioner" or "defendant") contentions regarding the refusal of the trial court to give a separate "present value" instruction. The opinion of the Missouri Supreme Court, en banc, on this issue clearly indicates that the rejection of petitioner's claims was based upon an independent and adequate state ground which bars review in this Court. *Murdock* v. *City of Memphis,* 20 Wall. (87 U.S.) 590, 22 L.Ed. 429 (1875); *Henry* v. *State of Mississippi,* 379 U.S. 443 85 S.Ct. 564, 13 L.Ed.2d 408 (1965); *Michigan* v. *Tyler,* 436 U.S. 499, 512 n.7, 98 S.Ct. 1942, 1951 n.7, 56 L.Ed.2d 486 (1978).

The basis of the Missouri Supreme Court's rejection of petitioner's claim is set forth in its opinion in the instant case as follows:

> Frisco's third point is that the Trial Court erred in refusing to submit to the jury a present value instruction. In Dunn, at p. 253, we dealt with a very similar issue and held that a present value instruction was not appropriate under MAI. We are not persuaded that Federal law requires the instruction. Frisco's third point is denied.

647 S.W.2d at 510.

The *Dunn* case referred to in the opinion in the instant case disposed of a similar contention concerning the refusal of a separate present value instruction as follows:

> Instruction 7, a damages instruction authorized by MAI 4.01, was given in this case. Any further explanation of the MAI damages instruction by the tendered instruction E is not acceptable procedure under MAI. McBee v. Schlupbach, 529 S.W.2nd 435, 439 [2] (Mo.App. 1975); Jurgeson v. Romine, 442 S.W.2nd 176, 177 [1-3] (Mo.App. 1969).
>
> Thus, defendant's proffered instructions B, D, and E were properly refused under MAI. Further, the circumstances or the guidelines set forth in Rogers v. Thompson, 308 S.W.2d 688, 692 [2] (Mo. 1958), would not indicate that the trial Court's action interfered with Federal rights. There is no compelling reason to limit application of the general rule that the form of instructions and manner in which the substantive law is submitted to the jury in an F.E.L.A. case are procedural matters governed by state law. Rogers; 79 A.L.R.2d 553, 572-573 (1961).

Dunn v. *St. Louis-San Francisco Railway Co.*, 621 S.W.2d 245, 253 (Mo. banc 1981), *cert. denied sub. nom. Burlington Northern Railroad Co.* v. *Dunn*, 454 U.S. 1145, 102 S.Ct. 1007 (1982).

Examination of one of the cited cases, *Jurgeson* v. *Romine*, 442 S.W.2d 176 (Mo.App. 1969), more fully reveals the basis for the Missouri Supreme Court's opinion. In that case, a damage instruction authorized by MAI was given by the Court. The defendant in that case, rather than seeking to submit a proper modification of the MAI instruction, offered a separate damage instruction, Instruction No. 8 which was refused by the Court. In rejecting the defendant's contention on appeal that it was error to refuse the separate damage instruction, the Court held as follows:

Furthermore we presume defendant offered Instruction No. 8 pursuant to the rule generally observed before the adoption of M.A.I. that 'Where an instruction on the measure of damages, though general, is not erroneous in its general scope, its generality does not constitute error and if the defendant fears such instruction may be misunderstood he must submit an explanatory or modifying instruction or he will not be heard to complain.' Raymond, Missouri Instructions, Sec. 132; Brunk v. Hamilton-Brown Shoe Company, Mo., 66 S.W.2d 903, 909. Samuels v. Illinois Fire Insurance Co., Mo.App., 354 S.W.2d 352, 362(20). However, Supreme Court rule 70.01 (b), which has been effective since January 1, 1965, provides:

> Whenever Missouri Approved Instruction contains an instruction applicable in a particular case which the appropriate party requests or the court decides to submit, such instruction shall be given to the exclusion of any other on the same subject.

We take it that this applies to measure of damages instructions. The Jack L. Baker Companies, Inc. v. Pasley Manufacturing and Distributing Company, Mo., 413 S.W.2d 268, 273 (5,6). The old rule authorizing separate damage instructions for plaintiffs and defendants should no longer be followed. If the offered Instruction No. 3 did not clearly submit the issues in this case, it should have been modified so that it would do so. The trial court did not err in refusing Instruction No. 8.

442 S.W.2d at 177

Again, in *McBee* v. *Schlupbach,* 529 S.W.2d 435 (Mo.App. 1975), the Court reversed and remanded for a new trial on the issue of damages when a separate instruction offered by the defendant was offered and given in addition to the applicable MAI damage instruction. In that case, the MAI instruction fair-

ly submitted all of the damage issues in the case and the separate instruction argumentatively emphasized elements contained in the defendant's converse verdict directing Instruction No. 5.

These conclusions follow directly from the literal language of Missouri Supreme Court Rule 70.02, dealing with jury instructions.

Rule 70.02(b) provides:

> (b) Missouri Approved Instructions Exclude Others. Whenever Missouri Approved Instructions contains an instruction applicable in a particular case which the appropriate party requests or the court decides to submit, such instruction shall be given to the exclusion of any other on the same subject.

Rule 70.02(e) provides:

> (e) Guide for the Form of Instructions Where MAI Not Used. Where an MAI must be modified to fairly submit the issues in a particular case, or where there is no applicable MAI so that an instruction not in MAI must be given, then such modifications or such instructions shall be simple, brief, impartial, free from argument, and shall not submit to the jury or require findings of detailed evidentiary facts.

Thus, under Missouri law, it is quite clear that if petitioner in the instant case deemed the damage instruction given by the Court to be inadequate because it contained no reference to present value, the proper procedure under Missouri law would have been for petitioner to have prepared a modified version of the MAI damage instruction embodying a brief, simple and impartial modification rather than the separate damage instruction which is offered and which was refused. The principle that separate damage instructions are not permitted under MAI is well established, uniformly applied, and well known to all members of the Missouri Trial Bar.

Missouri's procedural rules regarding Missouri Approved Instructions (and the form of instruction where a modification of a Missouri Approved Instruction is required) are supported by a legitimate, if not a compelling, state interest. That interest was set forth by the Missouri Supreme Court in *Brown* v. *St. Louis Public Service Co.*, 421 S.W.2d 255, 257 (Mo.banc 1967), as follows:

> This court, by its adoption of Missouri Approved Instructions, promulgated precise approved instructions. These had been drafted after much research and great effort on the part of the court's special committee and its able reporter, the late Professor John S. Divilbiss. A preliminary draft was distributed and suggestions were received from the bench and bar before final adoption. *The system was devised to eliminate the old system of complex, detailed and frequently argumentative instructions which caused great difficulty for jurors, lawyers and judges, and resulted in a high percentage of reversals on account of instructions given or refused. The special committee carefully considered the precise words to use in each approved instruction in order to provide simple, concise and understandable instructions.* Directions as to the format to be followed were given to cover those instances where no MAI instruction is provided or where the facts of a case require modification of an MAI instruction. When an MAI instruction is applicable, its use is mandatory. (emphasis supplied)

Contrary to petitioner's implications, the Missouri Supreme Court's disapproval of a separate present value instruction which, as set forth above, is inconsistent with the compelling policies of MAI, does not mean that Missouri rejects the present value principle in determining the proper measure of damages in F.E.L.A. cases or in cases involving any other sort of claim. The Missouri Supreme Court's per curiam opinion on rehearing in the instant case made it clear that the Court recognizes that the

proper measure of damages for lost future earnings is the present value of those future earnings. 647 S.W.2d at 513. The holding of the Missouri Supreme Court in the instant case is simply that the present value question should be handled by argument and the introduction of evidence rather than by instruction, since the MAI scheme is inconsistent with a multiplicity of damage instructions specifying each and every detail of damage computation. As recognized by the Missouri Supreme Court in the instant case, the present value question was so handled in *Sampson* v. *Missouri Pacific Railway Co.*, 560 S.W.2d 573, (Mo. banc 1978). See also *Coffman* v. *St. Louis-San Francisco Railway Co.*, 378 S.W.2d 583, 600 (Mo. 1964), relied on by the *Sampson* Court, 560 S.W.2d at 589. In this regard, it should be noted that defendant in the instant case, in final argument, vigorously argued the fact that plaintiff could earn interest on the award, and specified a rate of 6%, urging the jury to reduce its award, if any (T. 608-609, 640).

This approach, further, is not in any manner inconsistent with the prior decisions of this Court. Examination of *Cheaspeake & Ohio Railway Co.* v. *Kelly*, 241 U.S. 485, 36 S.Ct. 630 (1916), heavily relied on by petitioner, in light of this Court's recent opinion in *Jones & Laughlin Steel Corp.* v. *Pfeifer*, ____ U.S. ____ 103 S.Ct. 2541 (1983), makes this clear. Petitioner cites *Kelly* for the proposition that an instruction on present value must be given to the jury in all cases. A close reading of *Kelly*, however, does not support that interpretation. In *Kelly*, the Court's opinion does not reflect any attempt on behalf of the railroad to present evidence as to present value. The railroad chose to present the issue only by requesting an instruction. The instruction was refused by the trial court and the Court of Appeals affirmed that refusal, holding that, as a matter of law, the proper measure of damages was the gross amount of the expected pecuniary benefits which would have been received from plaintiff's decedent and not the present value of that sum. In reversing, this Court did not hold that the only way

to approach the present value question was by instruction. Rather, this Court held that the Court of Appeals had erroneously interpreted the proper measure of damages by holding that the proper measure was a gross sum rather than the present value of that sum. Reversal was required because the Court of Appeals had explicity relied upon an improper measure of damages. This Court, however, made it very clear that the states would be accorded great flexibility in addressing this problem and stated as follows:

> Whether the difficulty should be met by admitting the testimony of expert witneses, or by receiving in evidence the standard interest and annuity tables in which present values are worked out at various rates of interest and for various periods covering the ordinary expectancies of life, it is not for us in this case to say. Like other questions of procedure and evidence, it is to be determined according to the law of the forum.

241 U.S. at 491, 36 S.Ct. at 632.

For many years following *Kelly*, a gross inequity was practiced wherein Courts employed a discount rate to reduce a plaintiff's award while refusing to take into account the effects of inflation or other factors which would result in such an award being inadequate. The demise of this inequity was foreshadowed by Justice Stevens' recognition that future inflation could be a proper subject of expert testimony and estimate in *Norfolk & Western Railway Co.* v. *Liepelt*, 444 U.S. 490, 494, 100 S.Ct. 755, 758 (1980). Thereafter, this Court explicitly addressed the problem, again through Justice Stevens, in *Jones & Laughlin Steel Corp.* v. *Pfeifer*, ____ U.S. ____ 103 S.Ct. 2541 (1983).

In *Pfeifer*, this Court recognized that there was an inequity which could "no longer be tolerated", ____ U.S. at ____, 103 S.Ct. at 2552, in discounting an award of lost future earnings by a market interest rate while simultaneously ignoring the extent

to which such a rate either anticipates or is offset by future price inflation or other societal factors causing wage increases. Such a system undercompensates an injured plaintiff.

This Court then went on to examine the various methods devised by the courts to apply the rule that the measure of damages for future lost wages is the present value of those lost wages in an inflationary economy. This Court, however, expressly declined to adopt any one of the approaches proposed to it "as the exclusive method in all federal trials for calculating an award for lost earnings in an inflationary economy." ____ U.S. at ____, 103 S.Ct. at 2552. Rather, this Court sought only to set forth the general parameters of legally acceptable approaches. The approach established by the opinion below in the instant case, allowing the damage issues for future lost wages to be addressed by expert testimony and/or argument without jury instruction on either inflation or the use of a discount rate, is entirely consistent with the flexible approach taken by this Court in *Pfeifer*.

The Court of Appeals in *Pfeifer* had held the total offset method, wherein future inflation is flatly assumed to wholly offset the discount rate, to be mandatory in the federal courts. This Court vacated and remanded that judgment because it was not prepared to force the use of that method on all parties in all cases, without any regard being given to the economic patterns in particular industries.

However, this Court noted that the so called Carlson method, see 62 ABAJ 628(1976), which posits the thesis that the market rate of interest is wholly offset by price inflation and societal productivity gains, is simple and may be economically precise. In explaining the use of the Carlson method, ____ U.S. at ____ n.32, 103 S.Ct. at 2557 n.32, this Court set forth an approach to damages calculation which would clearly eliminate the need for any instruction or evidence pertaining to a discount rate or inflationary trends; a rather explicit demonstration that the

federal law of damages does not require the instruction to be given in all cases.

The approach taken by the Missouri Supreme Court below in the instant case does not go so far, as does the Carlson approach, as to assume a total offset. Rather, in line with the policies of MAI, it forbids separate damage instructions on inflation or on discounting while allowing the parties to present evidence and argument in this regard to the triers of fact. In this manner, Missouri observes the federal measure of damages as set forth in *Kelly* while also accomodating the policies of its procedural system for jury instruction, in line with the *Kelly* Court's admonition that the precise method of observing the present value principle was a procedural matter left to the law of the forum. 241 U.S. at 491, 36 S.Ct. at 632.

The unarticulated premise of defendant's argument on this point, and with respect to its other challenges to Missouri jury practice, is that a state court trying an F.E.L.A. case must duplicate each and every procedural aspect of federal jury practice, right down to the form of instructions. But that notion has always been rejected by this Court as antithetical to the fundamental principles of federalism inherent in the concept of concurrent state and federal jurisdiction of F.E.L.A. suits. *E.g., Minneapolis & St. Louis R. Co.* v. *Bombolis*, 241 U.S. 211, 36 S.Ct. 595 (1916). *See also Brown* v. *Gerdes*, 321 U.S. 178, 189-190, 64 S.Ct. 487, 492-493 (1944) (concurring opinion).

The opinion below exhibits complete fidelity to the substantive measure of damages in F.E.L.A. cases announced in Kelly as well as accomodating the flexible approach to the question of measuring damages in an inflationary economy espoused in *Pfeifer*. The opinion below is entirely consistent with the decisions of this Court and for that reason the writ should be denied.

II.

Defendant's Contentions Regarding The Omission Of The Word "Direct" From MAI No. 8.02 Are Likewise Entirely Without Merit.

Defendant's contentions concerning the absence of the word "direct" from MAI No. 8.02 are similarly without merit. It is a full and complete answer to defendant's constitutional contentions that the absence of the word direct from MAI No. 8.02 is for the purpose of making that instruction comply with the substantive law. Since the instruction is in this form for the purpose of complying with the substantive federal law, there can be no violation of equal protection, due process or the Supremacy clause, as this would clearly constitute a reasonable basis for the differences between MAI No. 8.02 and MAI No. 4.01. This matter was carefully considered by the Missouri Supreme Court Committee on Instruction and this change was only recently made in the 1978 revisions. The Committee explains this change as follows:

> This instruction is used only in an F.E.L.A. case wherein the employee sustained injury. It is a duplicate of MAI 4.01 with the exception that the word "direct" is deleted from the fifth line of MAI 4.01. This is done in an F.E.L.A. case so that the instruction complies with the correct substantive law, Wilmoth v. Rock Island Railroad 486 S.W.2d 631 (Mo. 1973); Crane v. Cedar Rapids and Iowa City Ry. Co., 395 U.S. 314 (1969); and Rogers v. Mo. Pac. Ry., 352 U.S. 500 (1957)." (MAI No. 8.02, Committee's Comment.)

The reasoning underlying the omission of the word direct from this damages instruction is further amplified in the committee's comment to the revision to MAI No. 24.01, which states as follows (MAI No. 24.01, Committee's Comment):

In an F.E.L.A. case, common law negligence rules are controlling except that these rules have been abrogated by F.E.L.A. Because of the 'in whole or in part' language of the statute (Title 45, U.S.C.A., Section 51), the traditional doctrine of proximate (direct) cause is not applicable. A railroad is liable if its negligence is only the slightest cause of the employee's injury. *Rogers* v. *Mo. Pac. Ry.*, 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493 (1957).

In the traditional negligence case, it is mandatory for the plaintiff to include the word 'direct' or 'directly' in his instruction because of the proximate (direct) cause requirements.

This prevents the jury from awarding damages or finding for plaintiff because of some indirect or contributing causative factors. This is not so with F.E.L.A. The F.E.L.A. 'was enacted because the Congres was dissatisfied with the common law duty of the master to his servant. The statute supplants that duty with the far more drastic duty of paying damages for injury or death at work due in whole or in part to the employer's negligence.' *Rogers* v. *Mo. Pac. Ry.*, supra, 352 U.S. 500, 507. The test of a jury case under F.E.L.A. is simply 'whether the proofs justify within reason the conclusion that employer's negligence played any part, even the slightest, in producing injury or death for which damages are sought.' (emphasis added). *Rogers* v. *Mo. Pac. Ry.*, supra, 352 U.S. 500, 506. The fact that there may have been a number of causes of the injury is, therefore, irrelevant as long as one cause may be attributable to the railroad's negligence. *Heater* v. *C & O Ry. Co.*, 497 F.2d 1243, 1246.

As the United States Supreme Court has stated in *Rogers* v. *Mo. Pac. Ry.*, supra, in an F.E.L.A. case, the employer railroad is stripped of its common law defenses. The statute is an avowed departure from the rules of common

law. Our state Supreme Court has consistently hald that the federal interpretation of F.E.L.A. is binding on the Missouri state courts. *Headrick* v. *Kansas City Southern Ry.*, 305 S.W.2d 478 (Mo. 1957); *Adams* v. *Atchinson, T. & S.F. Ry.*, 280 S.W.2d 84 (Mo. 1955).

It is obvious from the foregoing that the Missouri Courts recognize that federal law is controlling as to substantive aspects of the F.E.L.A. in cases tried in state court. The present form of MAI 8.01 is nothing more or less than action designed to conform MAI instruction to federal substantive law. In this regard, a review of the F.E.L.A. damage instructions contained in *Devitt & Blackmar, Federal Jury Practice and Instructions,* shows they do not uniformly require inclusion of the word "direct." Judge Blackmar, coauthor of the foregoing authority and author of the opinion below, certainly cannot be considered a neophyte with respect to these issues, and his opinion below discloses no concern that MAI 8.02 deprives the defendant herein of any substantive federal rights in any respect. Further, the opinion below, in a finding not challenged by defendant in this Court, clearly notes, that on the facts of this case, there was no confusion on the part of the jury as to the incident responsible for plaintiff's damages, nor was the defendant in any manner prejudiced by MAI 8.02. 647 S.W.2d at 510.

For the foregoing reasons, defendant's contentions are entirely without merit.

III.

Petitioner's Contentions Concerning The Income Tax Instruction In This Case Are Completely Erroneous And Meritless. The Affirmance By The Court Below Was A Simple Application Of the Harmless Error Rule. Further, This Case Presents A Singular Situation Which Will Not Recur In The Missouri Courts Since MAI Now Requires Liepelt Type Instructions To Be Given In All F.E.L.A. Cases And The Failure To So Instruct Is Construed To Be Presumptively Prejudicial By The Missouri Courts.

Petitioner erroneously seeks to lead this Court to believe that the opinion below in the instant case will "emasculate *Liepelt*" (Pet. 16-17), arguing that trial courts in the future will cynically and deliberately refuse to comply with *Liepelt* secure in the supposed confidence that the error will not be held to be prejudicial or reversible. Nothing could be further from the actual situation, especially in the Missouri Courts.

Petitioner's argument totally disregards the fact that this Court, in *Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U.S. 473, 101 S.Ct. 2870 (1981), specifically authorized an examination of the record in a case where the income tax instruction was refused to determine whether defendant had been prejudiced by the refusal in that case. In *Gulf Offshore*, a case under the Outer Continental Shelf Lands Act (OCSLA) this Court remanded to the State Court for a determination of whether state law in that case required a *Liepelt* type instruction and, if not, whether *Liepelt* nevertheless established a federal rule of decision which required such an instruction in an OCSLA case regardless of state law. This Court then directed that:

> If the court decides that it was error to refuse the instruction it may then address respondent's argument that petitioner was not prejudiced by the error.

453 U.S. at 488, 101 S.Ct. at 2880.

This Court has also given its implicit approval to the application of harmless error analysis to *Liepelt* type cases by its denial of certiorari in *Flanigan* v. *Burlington Northern, Inc.*, 632 F.2d 880 (8th Cir. 1980), *cert. denied*, 450 U.S. 921, 101 S.Ct. 1370 (1981); and *Vanskike* v. *ACF Industries, Inc.*, 665 F.2d 188 (8th Cir. 1981), *cert. denied*, 455 U.S. 1000, 102 S.Ct. 1632 (1982). *Cf. Ingle* v. *Illinois Central Gulf R. Co.*, 608 S.W.2d 76 (Mo.App. 1980), *cert. denied*, 450 U.S. 916, 101 S.Ct. 1359 (1981) (no prejudice to defendant unless damages awarded are excessive). The Courts in the foregoing decisions have consistently examined the question of whether there were objective

indications or evidence that the jury was operating under a false impression of the tax law. One primary indicator to be considered is whether the verdict returned by the jury is an excessive one. The obvious excessiveness of the verdict returned by the jury in *Liepelt* was clearly a factor which influenced this Court to find that reversible error has been committed.

A brief examination of the evidence pertaining to plaintiff's injuries and damages makes it quite clear that the verdict returned by the jury in the instant case can in no manner be considered to be excessive.

In reviewing the evidence in a light most favorable to the jury's verdict, and in indulging in all reasonable presumptions in favor of the verdict, it is apparent that the jury was able to conclude the following. Plaintiff was injured on January 18, 1973 (T.58). He was 30 years of age (T.50) and had not experienced significant back problems prior to that time (T.23,28,38-40,52,171). He had no preexisting back condition or abnormality of any kind (T.198,199,205-207,212,213, 376,409,442,446,461,462,480). He had been employed by the railroad since 1960 and had been continually engaged in heavy physical labor (T.52,56). He experienced severe pain immediately following his injury and was unable to stand or walk (T.100-102). Although he has received continual medical treatment thereafter, his severe pain and disability has continued to progress (T.102-105). He was required to seek a lighter job at work, however, he was unable to perform those duties and was unable to handle the work (T.104,107,172,179-182,186-192). He sought medical treatment to relieve his pain and disability without success (T.106,108). He received injections in the back, medication, back brace and other such treatment all to no avail (T.200,201,206-211,240,241). An Orthopedist initially recommended that he leave the railroad, however, plaintiff could not, it was his livelihood and he couldn't walk away from it (T.108). His pain and difficulty, however, became so severe that he became physically unable to continue his employment with the

railroad and was ultimately hospitalized (T.109-111). He underwent a spinal manipulation under general anasthesia, pelvic traction, physical therapy, heat treatments and massages with no improvement (T.109-111). He continued getting worse and was therefore rehospitalized for additional physical therapy and a myelogram (T.110,111,258,259). At that time he experienced severe back pain and stood with a left sided list (T.58,59). He had lost half the motion in his back and his muscles were in severe spasm (T.260,262). During those hospitalizations it was determined that plaintiff had degenerative disc disease, which is synonymous with disc injury, and reversed spondylolisthesis of the lumbosacral spine (T.242,251,263). The myelogram was abnormal and revealed a posterior bulge at the L4 disc space (T.307,308). The medical testimony conclusively established that the myelogram shows a ruptured disc (T.363,364, 365,420-424,431,481,482). Also the evidence at the trial revealed that in addition to the ruptured disc at L4-L5, plaintiff has sustained injury and deterioration to the disc at L5-S1, narrowing of the disc space between L4-L5 and L5-S1 and extensive injuries involving the bony structures of the lumbosacral spine. The injuries and damage to the bony structures include the apophyseal joints known as juxta-articular sclerosis; The right sacroiliac joint; reverse spondylolisthesis at L4 and L5; hypertrophic spurring and sclerosis at the facet joints of L4 and L5; degenerative arthritis and injury to the motion complex at L4-L5 and L5-S1 (T.263,267,268,272,273,277,279,280,284,285, 286-288,292,295,355,356,357,361,362-365,372,373,377,383,384, 385,386,387,388,420,421,422, 424, 431, 481, 482, 483, 484, 487, 489). The disc at L4-L5 is ruptured centrally, right towards the center, pushed straight back on the nerve roots (T.300-303, 307,308,373-375,414,415,423,424,484-489). Because of the severity of plaintiff's injuries, a normal disc operation will not relieve his symptoms (T.373-375,414,415,453,463,486,487). Plaintiff will require more extensive surgery involving a laminectomy;, removal of bone and an arthrodesis fusion from L4 to S1 (T.300-304,366,367,373-375,414,415). Plaintiff's con-

dition is permanent and progressive and he is unable to lift, bend, stoop or engage in any physical activities (T.304,385,390, 451,452,487). Plaintiff is going to get worse (T.398,487). Plaintiff will never be able to return to his railroad employment (T.304,385,390,451,452). It has been stipulated that plaintiff cannot rturn to the railroad in view of his injuries (T.113,168, 468). At the time of trial plaintiff's condition had deteriorated and it was becoming increasingly worse (T.116-120). He experiences constant pain and is extremely limited (T115-120). He has tried to get other work but has been unable because of his physical restrictions (T.115). His earnings since 1975 have been meager (T.114,115). In 1979 he earned less than $2,000 (T.115).

When one considers plaintiff's economic loss in light of his pain and suffering, it is obvious that this award can in no manner be considered to be excessive.

Further, it is obvious that this is not an appropriate case for the exercise of this Court's certiorari jurisdiction. Rule 17 of this Court's rules makes it clear that certiorari shall be granted only when there are special and important reasons therefor. The issue petitioner seeks to present concerning the *Liepelt* instruction and the treatment of it in the court below is extremely unlikely to arise in any future case. Immediately after the decision in *Liepelt* the Missouri Supreme Court Committee on jury instructions modified the MAI F.E.L.A. damage instructions to include a *Liepelt* type instruction instructing the jury that "any award you make is not subject to income tax." That modification to the instruction was approved by the Missouri Supreme Court and is now a part of the mandatory MAI damage instructions to be given in Missouri. It should be noted that this change in MAI instructions goes beyond *Liepelt*. *Liepelt* required that this instruction be given only upon the request of the defendant. The changes to the MAI instructions, however, do not limit this *Liepelt* addition only to cases in which the defendant requests the instruction. It is part of the body of the main instruction and must be given in every case. Further, because the *Liepelt* in-

struction is now part of the MAI damage instructions, it is expremely unlikely that the Missouri Supreme Court will ever employ the same harmless error analysis to the failure to give a *Liepelt* instruction as it did in the instant case. In *Brown* v. *St. Louis Public Service Co.*, 421 S.W.2d 255 (Mo. banc 1967), the Missouri Supreme Court, en banc, held that a deviation from an applicable MAI instruction which does not require modification under the facts of the particular case will result in a presumption of prejudicial error unless it is made perfectly clear by the proponent of the instruction that no prejudice could have resulted from the deviation. This standard would require the plaintiff to demonstrate and assume the burden of showing that no prejudice could have resulted. In the instant case, because this case was tried prior to the decision in *Liepelt*, and, therefore prior to the modification of MAI to conform with *Liepelt*, this strict harmelss error analysis was not applicable. Plaintiff is aware of no other case which is still pending in the Missouri Court system which was tried prior to the modification of the MAI damage instructions to include a *Liepelt* type instruction. Therefore, the issues presented by the Missouri Supreme Court harmless error analysis in the instant case will not recur. Accordingly, it would be entirely inappropriate to grant certiorari in order to review this issue.

For all of the foregoing reasons, defendant's contentions are entirely without merit and the writ should be denied.

IV.

Defendant's Contentions Concerning Plaintiff's Verdict Director, Based On MAI 24.01, Are Entirely Without Merit. The Instruction Is Consistent With The Provisions Of The Federal Employers Liability Act And, Accordingly, The Form Of The Instruction Is A Question To Be Determined By State Law.

Defendant's contentions concerning MAI 24.01 have previously been raised and consistently rejected in *Dunn* v. *St.*

Louis-San Francisco Railway Co., 621 S.W.2d 245, 254-255 (Mo. banc 1981), *cert. denied sub. nom., Burlington Northern Railroad Co.* v. *Dunn*, 454 U.S. 1145, 102 S.Ct. 1007 (1982); *Griffith* v. *St. Louis-San Francisco Railway Co.*, 559 S.W.2d 278, 280 (Mo.App. 1977), *cert. denied*, 436 U.S. 926, 98 S.Ct. 2821 (1978); *White* v. *St. Louis-San Francisco Railway Co.*, 602 S.W.2d 748, 754 (Mo.App. 1980); *Marshell* v. *Burlington Northern, Inc.*, 637 S.W.2d 168, 169 (Mo.App. 1982).

Contrary to defendant's argument, MAI 24.01 fully complies with the provisions of the Federal Employer's Liability Act. In fact, to the extent that defendant challenges the differences between the form MAI 24.01 and other verdict directors employed in the MAI system for causes of action arising under Missouri law, those differences are accounted for by the unique features of the F.E.L.A. which depart from the common law. This was fully explained by the Missouri Supreme Court in *Ricketts* v. *Kansas City Stock Yards Co.*, 484 S.W.2d 216, 221-222 (Mo. banc 1972). The Missouri Supreme Court explained the general submission of negligence in MAI 24.01 as follows:

> The Act [F.E.L.A.] provides an employer under it shall be liable "for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees." 45 U.S.C. § 51. As recently said in Boeing Co. v. Shipman, 5th Cir., 411 F.2d 365, 371: "Slight negligence, necessary to support an F.E.L.A. action, is defined as 'a failure to exercise great care,' and that burden of proof, obviously, is much less than the burden required to sustain recovery in ordinary negligence actions. Prosser, Law of Torts, § 34, p. 186 (3d ed. 1964)"; see also Prosser, Law of Torts, § 82, p. 560, noting as to the F.E.L.A. negligence: "This has been said to reduce the extent of the negligence required, as well as the quantum of proof necessary to establish it, to the 'vanishing point.' " ***This would seem to be a reason for MAI to allow a general submission of negligence in F.E.L.A. cases.***

484 S.W.2d at 221 (emphasis supplied).

The fact that MAI 24.01 is designed specifically to comply with federal substantive law is a complete answer to the defendant's equal protection, due process and supremacy clause arguments. Defendant's contention that MAI 24.01 is contrary to the F.E.L.A. or any other federal law applicable in this case is completely erroneous. Such contentions have previously been raised and rejected by this Court. In *Union Pacific R. Co.* v. *Hadley*, 246 U.S. 330, 38 S.Ct. 318 (1918), this Court rejected the defendant railroad's challenge to a submission of general negligence to the jury in emphatic terms, speaking through Justice Holmes:

> On the question of its negligence the defendant undertook to split up the charge into items mentioned in the declaration as constituent elements and to ask a ruling as to each. *But the whole may be greater than the sum of its parts, and the Court was justified in leaving the general question to the jury if it thought that the defendant should not be allowed to take the bundle apart and break the sticks separately, and if the defendant's conduct viewed as a whole warranted a finding of neglect. Upon that point there can be no question.* We are not left to the mere happening of the accident. There were block signals working on the road that gave automatic warning of danger to 501, and which it was negligent to pass, seen or unseen, as the engine crew knew where they were and that another train was not far ahead. There was a snow storm raging which the jury might have found to have been of unprecedented violence, and it was open to them to find in view of circumstances unnecessary to detail that the dispatcher ought not to have sent out Extra 510 West as he did and that he was grossly wrong in not allowing 504 to come in and in not leaving it to 501 to bring back the disabled engine. It might have been found improper to leave the conductor of 501 at Potter. It is superfluous to say more upon this point.

246 U.S. at 332-333, 38 S.Ct. at 319 (emphasis supplied).

The evidence fully supported plaintiff's verdict directing instruction based upon defendant's failure to provide reasonably safe conditions for work and reasonably safe methods of work. With respect to defendant's failure to provide reasonably safe conditions for work the evidence established that plaintiff's supervisor instructed him to straighten the end of the box car, to push it from the inside outward (T.7,35,42). He was required to use a load or floor jack weighing approximately 300 pounds (T.8,31,32,44). The manufacturer's literature described the weight of the jacks as from 370 to 394 pounds (T.175). A 6 foot to 10 foot wooden pole would be used with the jack to push the end outward (T.16,17,42,44,45). The box car in which he was required to work had no floor (T.8,36,44,45,81). There was nothing to stand on other than the 14" center sill, inasmuch as the stringers had been removed (T.83,84). Before plaintiff started working, the employees requested the supervisor to provide plywood for a temporary floor to work on (T.8,81). The supervisor responded that plywood could not be furnished, to do it the way it was (T.9,81,82). In that car they were instructed to lay the jack on its side on the center sill; that's the only position they could get it in to push the corrugation out (T.10,13-15,46,89,96). One man would have to straddle the center sill and stand on a 2 inch flange on either side of the center sill (T.19,84,85). He would have to balance on the center sill and stabilize, lift and pull the entire weight of the jack along (T.14,15,19,20,46,95-100). The jack had wheels, but the wheel base was too wide for the center sill (T.15,16,91), and plaintiff was required to strain, pull and tug the heavy jack in order to reposition it (T.19,45,46,95). The sides and base of the jack were round, causing it to roll from side to side, making plaintiff's task even more difficult (T.10,11,91,96,97). Numerous employees testified that the conditions were unsafe because of the absence of flooring (T.12,21,47). They couldn't get adequate footing to stand and maneuver the heavy jack (T.12). If they had plywood they wouldn't have had to work in a strained

position (T.12). Without plywood, with the jack positioned on the center sill, it would be a one man job - no place for another employee to stand (T.13-15, 46,96). If there was ply wood provided, they could have used two or three men (T.12,13,20,49,96). Without plywood one man would have had to balance on the center sill and perform the heavy and strenuous lifting and pulling alone (T.14,15,19,46,84,85,96-100). The reason that only one man could do the job was because there was no place for another man to stand and assist him (T.20,96). The work was being performed by plaintiff under those conditions at the time of his injury (T.20). The aforesaid, therefore, clearly established the failure of defendant to provide reasonably safe working conditions which resulted in plaintiff's injuries.

With respect to defendant's failure to provide reasonably safe methods of work, the evidence unequivocally established that the jack and pole method was unsafe (T.10,11,22,38,43,47,49,50,72,74,84). The load jack was intended to be used to lift loads upwards while standing on its base (T.10,43,84). It was not supposed to be used laying down (T.43). There was no base for it to be positioned on its side (T.10). The sides were round and the jack would roll from side to side (T.10,11). Numerous complaints had been made to the supervisors prior to plaintiff's injury about using the jack and pole method to push the ends of cars outward (T.11,21,174,175). They were told that was the way they would have to do it (T.12). Although plaintiff completed his apprenticeship and had read various articles, he had never been instructed and had never read of the method of pushing the end of a car outward with a jack and pole (T.78,79). With minor damage, plaintiff had been taught the method of utilizing a heating torch and beating the end outward with a hammer (T.77). He had also been instructed in the method of heating and pulling the end outward with a mechanical hoist (T.77). With extensive damage, plaintiff was always taught to remove and straighten the end in the blacksmith shop (T.78). Numerous

employees testified that based upon their experience, the safe method to do that job would have been to remove the end and either replace it with a new one or have it straightened under the press at the blacksmith shop (T.22,38,47,49,50). That safe method of performing the work had been used on numerous occasions (T.22,72,74). The end can be removed in 30 to 45 minutes and pressed outin 20 minutes (T.70). 45 minutes to an hour would be required to replace the end (T.71). The blacksmith shop was a short distance from the work area (T.67). Althought the plaintiff suggested to his foreman that the end should be taken off and replaced or repaired, the foreman stated that he wanted it pushed out (T.75,80). Had the alternative method been utilized, it is clear that plaintiff would not have sustained the injuries and damages involved in this occurrence.

In the instant case, there can be no question that the evidence, viewed as a whole, justified a finding of negligence on the part of the defendant. The *Hadley* holding was re-echoed by the Court in *Blair* v. *Baltimore & O.R. Co.* 323 U.S. 600, 604, 65 S.Ct. 545, 547 (1945), as follows:

> The negligence of the employer may be determined by viewing its conduct as a whole. Union Pacific Railroad Co. vs. Hadley, 246 U.S. 330, 332, 333, 38 S.Ct. 318, 319, 62 L. Ed. 751. And especially is this true in a case such as this, where the several elements from which negligence might be inferred are so closely interwoven as to form a single pattern, and where each imparts character to the others.

See also *Chicago & Northwestern Railway Co.* v. *Rieger,* 326 F.2d 329 (8th Cir.), *cert. denied* 377 U.S. 917, 84 S.Ct. 1182 (1964).

Under the provisions of the Federal Employer's Liability Act, defendant was obligated to fulfill its nondelegable duty to provide plaintiff with reasonably safe conditions and reasonably safe methods for work, stripped of its common law defenses

and liable if its negligence played any part, however slight, in producing plaintiff's injuries. This is a statutory negligence action that makes it significantly different from the ordinary common law negligence action. 45 U.S.C. Section 51, *Rogers* v. *Missouri Pacific Railroad Co.*, 352 U.S. 500, 507 - 509, 77 S.Ct. 443, 448-450 (1957); *Shenker* v. *Baltimore & Ohio Railroad Co.*, 374 U.S. 1, 7, 83 S.Ct. 1667, 1671-1672 (1963). Under the F.E.L.A., juries are not limited in their consideration of the evidence, as they are under common law actions. *Chicago, Rock Island & Pacific R.R.* v. *Melcher*, 333 F.2d 996, 999-1000 (8th Cir. 1964). They are permitted to draw inferrences based upon circumstantial evidence even though such inferrences might involve some speculation and conjecture. *Webb* v. *Illinois Central Railroad Co.*, 352 U.S. 512, 77 S.Ct. 451 (1957); *Lavender* v. *Kurn*, 327 U.S. 645, 653, 66 S.Ct. 740, 744 (1946). Instruction 3 submitted the ultimate issue of liability under the applicable substantive law.

Missouri rules concerning the form of approved instructions are procedural in nature. *Meredith* v. *Missouri Pacific Railroad Co.*, 467 S.W.2d 79, 82 (Mo. 1971). When, as here, an instruction in an F.E.L.A. case correctly states the substantive law and is clearly supported by the evidence, the form of the instruction is a matter left to state procedural law. *Union Pacific Railroad Co.* v. *Hadley*, 246 U.S. 330, 38 S.Ct. 318 (1918); *Minneapolis & St. Louis Railroad Co.* v. *Bombolis*, 241 U.S. 211, 36 S.Ct. 595 (1916); *C.f.*, *Lyons* v. *State of Oklahoma*, 322 U.S. 596, 601, 64 S.Ct. 1208, 1212 (1944); *Brown* v. *Gerdes*, 321 U.S. 178, 189-190, 64 S.Ct. 487, 492-493 (1944) (concurring opinion).

For all the foregoing reasons, defendant's contentions regarding MAI 24.01 are entirely without merit.

CONCLUSION

For all of the foregoing reasons, plaintiff (respondent) respectfully submits that the judgement of the Missouri Supreme Court, en banc, below, is entirely correct and that the same does not warrant review by this court. For that reason, it is further respectfully submitted and urged that the petition for writ of certiorari in the instant case should be denied.

Respectfully submitted,

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